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JUSTICE ACCORDING TO LAW.

II.

III. LEGISLATIVE JUSTICE.[55]

Until recently, the theory of separation of powers was fundamental in our juristic thinking as well as in our political thinking. It was taken to be an axiom of free government. The proposition that separation of powers is essential to liberty was accepted as stated by Montesquieu:

"There is no liberty if the power of judging is not separated from the legislative power and from the executive power. If it were joined to the legislative power, the power over the life and the liberty of the citizens would be arbitrary; for the judge would be legislator. If it were joined to the executive power, the judge might have the force of an oppressor."[56]

Hitherto, moreover, the development of our legal system had conformed steadily to this theory. In the sixteenth and seventeenth centuries it was settled that the crown had no part in the administration of justice, that causes which concern the life or inheritance or goods or fortune of the subject were not to be decided by the natural reason of the executive "but by the artificial reason and judgment of the law" as pronounced by the king's justices.[57] Legislative justice lingered in legislative divorces, acts of attainder and of pains and penalties, and private acts of parliament or of legislatures creating special rules for particular cases

[55]Sidgwick, Elements of Politics, 355-356, 360, 482-484; Burgess, Political Science and Constitutional Law, II, 356-361; Benton, The Distinction between Legislative and Judicial Functions, Rep. Am. Bar Assn. VIII, 261.

[56]Esprit des lois, liv. xi, chap. 6. "Liberty can have nothing to fear from the judiciary alone, but would have everything to fear from the union with either of the other departments." Federalist, No. 78.

[57]Case of Prohibitions del Roy (1608) 12 Rep. 63.

or individuals or affording special relief. Legislative divorces were known in New York after the Revolution,[58] and in Pennsylvania,[59] Ohio,[60] Maryland,[61] Connecticut[62] and Rhode Island[63] in the nineteenth century. Pennsylvania did not abolish them till 1874, and so late as 1887 the dissolution of a particular marriage was held a rightful subject of legislation by a territory of the United States.[64] Acts of attainder and bills of pains and penalties were not uncommon in America during and after the Revolution.[65] The legislature of Rhode Island exercised jurisdiction in insolvency until 1832.[66] During the Revolution and even later the practice obtained in some states of awarding a new trial by legislative act after final judgment.[67] Finally appellate jurisdiction was exercised by the legislature in Rhode Island till 1857[68] and by the senate in New York till 1846.[69] But the nineteenth century saw the end of almost all such legislation. Legislative divorces came to an end in England in 1856 and are now precluded by constitutional provisions in the several United States.[70] The Federal Constitution put an end to acts of attainder and bills of pains and penalties, and English writers of the eighteenth century regarded

[58]Kent, Commentaries, II, 97.

[59]Cronise *v.* Cronise (1867) 54 Pa. St. 255, 260. In 1873, the last year in which such jurisdiction was exercised, eighteen private divorce acts were passed. See Loyd, Early Courts of Pennsylvania, 102.

[60]Bingham *v.* Miller (1848) 17 Ohio, 445.

[61]Crane *v.* Meginnis (1829) 1 Gill & J. 463, 474.

[62]Starr *v.* Pease (1831) 8 Conn. 541.

[63]The Rhode Island legislature entertained applications for divorce till 1852. Eaton, Development of the Judicial System in Rhode Island, 14 Yale Law Journ. 148, 153.

[64]Maynard *v.* Hill (1888) 125 U. S. 190. The legislature of Alabama granted a divorce in the session of 1888-1889. But the act was held unconstitutional. Jones *v.* Jones (1891) 95 Ala. 443.

[65]Thompson *v.* Carr (1831) 5 N. H. 510; Cooper *v.* Telfair (1800) 4 Dall. 14; Sleight *v.* Kane (N. Y. 1801) 2 Johns. 236; Jackson *v.* Sands (N. Y. 1801) 2 Johns. 267; Thompson, Anti-Loyalist Legislation During the American Revolution, 3 Illinois Law Rev. 81, 147.

[66]Eaton, Development of the Judicial System in Rhode Island, 14 Yale Law Journ. 148, 150-153.

[67]Plumer, Life of William Plumer, 170; Warren, History of the American Bar, 136. In Merrill *v.* Sherburne (1818) 1 N. H. 199, 216, four cases of this legislative granting of new trials between 1791 and 1817 are referred to.

[68]See Mr. Eaton's paper, note 63, *supra.*

[69]An account of the abolition of this jurisdiction and the reasons therefor may be found in Browne, The New York Court of Appeals, 2 Green Bag, 277, 278.

[70]Bondy, The Separation of Governmental Powers (Columbia University Studies in History, Economics and Public Law, vol. 5, no. 2) chap. 12.

them as vicious in principle and substantially obsolete.[71] The abortive bill of pains and penalties brought against Queen Caroline is probably the last of its kind. In consequence of constitutional provisions, the courts put an end to legislative granting of new trials early in the last century.[72] As has been seen, legislative appellate jurisdiction ended in this country in 1857. Adjustment of claims against the state by legislative assemblies still disgraces the public law of many commonwealths.[73] In England, however, by virtue of statutes, claims against the crown, after a formal petition of right and *fiat,* take the ordinary course of judicial proceedings.[74] And the federal government as well as an increasing number of the states, by providing courts of claims, have put justice between state and citizen on a footing of law rather than of politics.

This obsolescence of legislative justice apparently completed the legal structure founded by fourteenth-century judges, built up so laboriously by Coke, and fixed in American institutions by the Federal Constitution and the Fourteenth Amendment. We had achieved in very truth a *Rechtsstaat.* Our government was one of laws and not of men. Administration had become "only a very subordinate agency in the whole process of government."[75] Complete elimination of the personal equation in all matters affecting the life, liberty, property or fortune of the citizen seemed to have been attained. Nothing is so characteristic of American public law of the nineteenth century as the completeness with which executive action is tied down by legal liability and judicial review. The tendency was strong to commit matters of clearly executive character to the courts, and no small number of statutes had to be rejected for such violations of the constitutional separation of governmental powers.[76] But the paralysis of administration produced by our American exaggeration of the common-law doctrine of supremacy of law brought about a reaction. And that reaction, as the last remnants of legislative justice were disappearing,

[71]Wooddesson, Lectures, II, 382 *et seq.*

[72]Merrill *v.* Sherburne (1818) 1 N. H. 209.

[73]Fleischmann, The Dishonesty of Sovereignties, Rep. N. Y. State Bar Ass'n XXXIII, 229.

[74]Anson, Law and Custom of the Constitution (2nd ed.) II, 475.

[75]Amos, Science of Law, 397.

[76]It is noteworthy that the first cases in which acts of Congress were held unconstitutional by the Supreme Court of the United States were of this character. *In re* Hayburn (1792) 2 Dall. 409; U. S. *v.* Todd (1794) 13 How. 52, note.

brought back the long obsolete executive justice and has been making it an ordinary feature of our government.[77]

Somewhat later the paralysis of social legislation which appeared to be threatened in many jurisdictions by unhappy exercisings of the judicial power over unconstitutional legislation, has brought about a demand for something very like legislative justice in the form of direct popular action upon judicial questions or popular review of judicial decisions.[78] Hence, whereas twenty-five years ago it might have seemed pedantic to consider legislative justice and executive justice in any discussion of justice according to law, unless in the course of a historical sketch of the rise and progress of judicial justice, today the whole question of the agencies by which justice shall be administered is reopening and calls for solution along new lines. For the political theory of the immediate past rested upon philosophical principles which are failing us on every hand. Nor can we accept the lines which have been drawn as the result of historical development in the past as necessarily conclusive of the course which we shall take for the future. To answer this question today we must ask how far legislative justice, executive justice and judicial justice respectively further the ends of the administration of justice.

In the eighteenth century the separation of powers was regarded as an absolute and fundamental principle of law and politics. Montesquieu has been quoted. In the same spirit the French Declaration of the Rights of Man and of the Citizen asserts:

"Every community in which a separation of powers and a security of rights is not provided for, lacks a constitution."[79]

From eighteenth-century political and juristic thinking the idea passed into American constitutional law and the framers of our constitutions, state and federal, sought to make it the basis of our government. Thus, the Declaration of Rights of the Inhabitants of the Commonwealth of Massachusetts (1780) provides:

"In the government of this commonwealth, the legislative de-

[77]See *post*, IV, Executive Justice.

[78]See Smith, Spirit of American Government, 111-113; McCarthy, The Wisconsin Idea, 268-269. For recent discussions of this subject, see Roe, Our Judicial Oligarchy (1912); Ransom, Majority Rule and the Judiciary (1912).

[79]Declaration of the Rights of Man and of the Citizen, art. 16 (1789). Translations may be found in Paine, Rights of Man, and in Ritchie, Natural Rights. See also Blackstone, Commentaries, I, 142, 266; Rousseau. Contrat social, liv. iii, chaps. 1, 11.

partment shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men."[80]

But the attempt to make an exact analytical scheme of the powers of government according to this threefold division has failed.[81] As actually drawn in America, the line is historical only in many places.[82] Students of political science have discarded the theory of separation of powers as an absolute, fundamental doctrine,[83] and courts are finding themselves driven by experience of the impossibility of the thing to recognize that fine analytical lines cannot be drawn.[84] For sovereignty is a unit. The so-called three powers are not three distinct things; they are three general types of manifestation of one power. In the development of sovereignty, these three types have differentiated gradually as a

[80]Mass. Const. Pt. I, § 30. See Bondy, The Separation of Governmental Powers (Columbia University Studies in History, Economics and Public Law, vol. 5, no. 2) chap. 2.

[81]Goodnow, Principles of Administrative Law in the United States, 25-26; Willoughby, Constitutional Law of the United States, II, §§ 742, 743. *Cf.* Schouler, Ideals of the Republic, 206.

[82]Murray *v.* Hoboken Land & Improvement Co. (1855) 18 How. 272; Maynard *v.* Hill (1888) 125 U. S. 190; State *v.* Harmon (1877) 31 Oh. St. 250; Callanan *v.* Judd (1868) 23 Wis. 343, 349; Parkman *v.* Rice (1820) 16 Mass. 326, 329. See Bondy, The Separation of Governmental Powers, 69-85; Salmond, Jurisprudence, § 35.

[83]Goodnow, Comparative Administrative Law, I, chap. 3; Sidgwick, Elements of Politics, 363; Baldwin, Two Centuries' Growth of American Law, 37; Fuzier-Herman, La séparation des pouvoirs, 181 *et seq.;* Haurion, Principes de droit public, 446; Jellinek, Recht des modernen Staates (2nd ed.) I, 483-487, 585-601; Schmidt, Allgemeine Rechtslehre, I, 209-217; Treitschke, Politik (2nd ed.) II, 131 *et seq.* See also Powell, Separation of Powers, Pol. Science Quart. XXVII, 215.

[84]Brown *v.* Turner (1874) 70 N. C. 93, 102; George *v.* People (1897) 167 Ill. 447, 459; People *v.* Joyce (1910) 246 Ill. 124; France *v.* State (1897) 57 Oh. St. 1, 17; State *v.* Webster (1898) 150 Ind. 607, 621; Crawford *v.* Hathaway (1903) 67 Neb. 325, 367; Farm Investment Co. *v.* Carpenter (1900) 9 Wyo. 110, 144. *Cf.* Prentis *v.* Atlantic Coast Line (1908) 211 U. S. 210; People *v.* Willcox (1909) 194 N. Y. 383. There are courts, however, that still insist upon rigid analytical lines. *E. g.,* People *v.* Dickerson (1910) 164 Mich. 148, 153; City *v.* Schoeberlein (1907) 230 Ill. 496. American lawyers still state Montesquieu's doctrine in its extreme form. Schouler, Ideals of the Republic, chap. 9; Wyman, Administrative Law, § 17; Green, The Three Departments of Government, Proc. Kan. Bar Ass'n (1910) 27. "Nearly a half-century before our Federal Constitution emerged, Montesquieu formulated and defended upon *unanswerable philosophical and historical considerations* the dogma that neither public nor private liberty could be maintained without a division of the legislative, executive and judicial functions of government." Mr. Justice Lurton, A Government of Law or a Government of Men? No. Am. Rev. CXCIII, 9, 13-14 (Jan. 1911). (The italics are mine.)

result of experience that certain things which demand special competency or special training or special attention are done better by those who devote thereto their whole time or their whole attention for the time being. The principle involved, therefore, is no more than the principle involved in all specialization:

"The decisive reason," says Bluntschli, "for such specialization [*i. e.*, the separation of powers] is not the practical security of civil liberty, but the organic reason that every function will be better fulfilled if its organ is specially directed to this particular end than if quite different functions are assigned to the same organ."[85]

In legal and political history this specialization of function has proceeded very slowly. The first differentiation was a setting apart of the deliberative or legislative from the administrative or executive. Although the genius of Aristotle foresaw the further specialization that was to take place,[86] it had by no means taken place in his day, and the Roman polity to the end regularly confided judicial powers to administrative officers.[87] Many eighteenth-century writers carry their theory no further than separation of the legislative from the executive.[88] After differentiation of legislative from administrative functions has gone a long way, the judicial function may remain undifferentiated and may be exercised by both the legislative and the executive organs of the state. The ordinary judicial functions of the English king passed to his justices at a relatively early date and the residuum passed later to the court of chancery; so that by the seventeenth century all royal judicial power was obsolete.[89] But parliament retained judicial functions much longer. The most we can say is that judicial justice has grown out of and gradually been set apart from legislative and executive justice, and in the long run has tended to replace

[85]Allgemeine Staatslehre, bk. iii, chap. 7.

[86]Politics, VI, 14.

[87]Mommsen, Abriss des römischen Staatsrechts (2nd ed.) 236-238, 357-358.

[88]De Lolme, Constitution of England, Intr. Chaps. 3, 4; Rousseau, Contrat social, liv. iii, chap. 1. Locke, a century before, had recognized three powers, legislative, executive and federative (*i. e.*, treaty-making or diplomatic). But he conceived that the executive and the federative power should reside in the same person. Two Treatises on Government, bk. ii, chaps. 8, 12. It is obvious that historical reasons have determined the three-fold division in the American polity and the great insistence upon the judicial department. It is instructive to notice that the Canadian constitution has nominally a two-fold division only, while the Australian constitution here as elsewhere follows the American model. Clark, Australian Constitutional Law, 28 *et seq.*

[89]Prohibitions del Roy (1608) 12 Rep. 63.

them. But the exact lines are matters of practical convenience and expediency. Moreover this development has gone along with the development of justice according to law. It may well be asked, therefore, how far are these the same development seen from the respective sides of means and end? If they are so identical, it may be asked, on the one hand, does not justice according to law require a purely judicial administration in the modern state, and, on the other hand, has a judiciary any special or peculiar qualification for that part of the administration of justice which must proceed without law? To answer these questions we must have recourse to legal history as well as to politics and political philosophy.

Examples of legislative justice may be found in the Greek trials before popular assemblies, in the Roman capital trials before the people and appeals to the people in criminal causes,[90] in the Germanic administration of justice by the assemblies of freemen, in the judicial power of the English parliament, in the power of the French senate to "pass judgment upon the President of the Republic and the ministers and to take cognizance of attacks upon the security of the state,"[91] in the judicial power of the German Bundesrath,[92] in the exercise of judicial power by American colonial legislatures[93] and to some extent by state legislatures after the Revolution, in legislative impeachments, and in the disposition of claims against the state in most of our commonwealths today. Some of these instances are of no great value for our purposes, because they are taken from primitive societies in which all justice was crude. But for the most part they are modern, or relatively modern, and enable us to determine with assurance the characteristics of legislative justice. Examining the actual operation of legislative justice in the several cases named, it may be said without hesitation that in action it exhibits all the bad features of justice without law.

In the first place, legislative justice is unequal, uncertain, and

[90]Mommsen, Römisches Strafrecht, 151-174; Strachan-Davidson, Problems of the Roman Criminal Law, chaps. 8, 9.

[91]Loi constitutionelle du 24 février, 1875, art. 9.

[92]Constitution of the German Empire, art. 77. This is exercised in practice by delegation to a court or to legal experts. Laband, Staatsrecht des deutschen Reiches (5th ed.) I, § 29, III.

[93]Bigelow, Judicial Action by the Provincial Legislature of Massachusetts Bay, 2 Columbia Law Rev. 536; Miller, The Legislature of the Province of Virginia (Columbia University Studies in History, Economics and Public Law, vol. 28) 168; Fry, New Hampshire as a Royal Province (Columbia University Studies in History, Economics and Public Law, vol. 29) 440.

capricious. Bills of attainder, even in modern times, were too often merely legislative lynchings,[94] and bills of pains and penalties, of which there were many examples during and immediately after the Revolution, were enacted capriciously, were procured on grounds of ill will in relatively trivial cases as well as in the grave cases involving danger to the commonwealth for which they were supposed to be reserved, and became deservedly odious.[95] In Rhode Island, we are told, legislative divorces were sought and granted in cases that were too flimsy or too whimsical for judicial treatment."[96]

Again, legislative justice in its relatively short history in this country and in the relatively small number of cases in which it was exercised showed the influence of personal solicitation, lobbying and even corruption far beyond anything which even the most bitter opponent of our judicial system has charged against the courts in the course of a long history and after disposition of a huge volume of litigation.[97]

Thirdly, legislative justice has always proved highly susceptible

[94]Belknap, History of New Hampshire, chap. 26; Thompson *v.* Carr (1831) 5 N. H. 510; Jay, Works, I, 315; Moore, History of North Carolina, I, 255.

[95]Wooddesson, Lectures, II, Lect. 41; Tucker, Blackstone, I, 292-294; Adams, Works, X, 193; Hamilton, Works, I, 297; Federalist, no. 44; Miller, The Constitution, 584; Thompson, Anti-Loyalist Legislation During the American Revolution, 3 Illinois Law Rev. 81, 147. Professor Thompson says of the New Hampshire Act of 1778: "It proscribed seventy-six citizens and confiscated the property of twenty-six of them. * * * The act was blindly designed and in a violently partisan spirit. No liberty was given those banished to collect debts honestly due them; no distinction was made between those who withdrew from the state out of a sense of duty, and those who were, in fact, British subjects." (3 Illinois Law Rev. 151-2). Jay said of the New York Act of 1779, which forfeited the estates of fifty-nine persons and made them liable to the penalty of death, if found in the state, "New York is disgraced by injustice too palpable to admit even of palliation." Works, I, 315.

[96]Eaton, The Development of the Judicial System in Rhode Island, 14 Yale Law Journ. 148, 153.

[97]*Ibid.* See also Plumer, Life of William Plumer, 176; Parker, C. J., in Pierce *v.* State (1843) 13 N. H. 536, 537; Debates of Pennsylvania Constitutional Convention (1873) III, 5-20. In Pennsylvania, down to the constitutional changes in 1874, the legislature could enact private laws upon a great variety of subjects, including divorce. In the debates in the Constitutional Convention of 1873 we read: "We all know that it is one of the most approved ways of bribing a member of the legislature to retain him as counsel for a particular interest upon which he is asked to legislate" (III, 7); "instead of going and making proper representations to the legislature * * * they would go and say to a member of the legislature: 'Here, I will give you so much money, you take this bill in charge, and put it through, and give me no more trouble about it.'" (*Id.* 11). As was said justly in the debate, nothing of the sort was ever heard of in purely judicial tribunals. (*Id.* 14). In the eighteenth century, trading votes on appeals (what we should call log-rolling) was a frequent practice among the lay peers. Encyclopedia Britannica (11th ed.) II, 214.

to the influence of passion and prejudice. This was very marked in the Greek popular courts and was, indeed, so much a matter of course, that rhetoricians taught the principles of appeals to the passion and prejudice of the tribunal and considered the cases where such appeals were expedient.[98] This feature of legislative justice was one of the chief causes of the odium which attached to acts of attainder and bills of pains and penalties at the end of the eighteenth century.[99] It is equally marked in legislative impeachments.[100]

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[98]Aristotle, Rhet. II, 2-8.

[99]Speaking of the North Carolina act of 1779, Professor Thompson says: "Among those who suffered was Sir Henry Dunkinfield, an enlightened Loyalist, whose crime simply amounted to a difference of political opinion." 3 Illinois Law Rev. 162. Of the proceedings in Pennsylvania after the British evacuation of Philadelphia, he says: "The passion and prejudice of the populace failed, at times, to distinguish between mere political sentiment and the giving of aid and comfort to the enemy." *Id.* 157. Tucker, writing in 1803, when the memory of such acts was fresh, said that an act of attainder was "a legislative declaration of the guilt of the party, without trial, without a hearing, and often without the examination of witnesses." Tucker's Blackstone, I, 293. See also Flick, Loyalism in New York during the American Revolution (Columbia University Studies in History, Economics and Public Law, vol. 14) chap. 7.

[100]Thus, in the impeachment of Judge Addison (Pennsylvania, 1803) both houses denied him a copy of the articles and compelled him to copy them for himself (Trial of Addison, 9); it was only by repeated application and after much opposition that he was allowed process for witnesses (*Id.* 7-15). The committee of the house of representatives, which considered the charges, reported that they "do not apprehend that the offences with which the said Alexander Addison stands charged in the said impeachment are sufficient ground to authorize and require the prosecution thereof by this house." The house summarily rejected this report and proceeded. *Id,* 13. The ground of the impeachment was at best that an erroneous view had been enforced as to the powers of the lay associates of the presiding judge, and the proceeding has been described by a judicial reviewer as "the most flagitious ever urged on by * * * obnoxious partisanship." Address of Judge Agnew before the Allegheny Bar Ass'n., Pennsylvania Magazine, XVI, 1. Loyd says of this impeachment, "the conduct of the legislature has met with general reprobation." Early Courts of Pennsylvania, 143. Of the impeachment of Chief Justice Shippen and Justices Yeates and Smith (Pennsylvania, 1805) the same author says: "That any doubt could be felt as to the issue of this trial is a matter of wonder, and that thirteen out of twenty-four senators voted for conviction is a lasting disgrace to their names." *Id.* 146. In the impeachment of Governor Butler (Nebraska, 1871) there was a conviction upon the first article which charged the governor with appropriating to his own use upwards of $16,000 of public money. The judgment pronounced was simply removal from office. As the one dissenting senator said, *arguendo,* "if the governor is a suitable person to hold office hereafter, I do not see why we should remove him at the present time." (Trial of David Butler, 55). In 1877 the legislature adopted the following resolution: "That the records of the impeachment and removal from office of David Butler, late governor, be and the same are hereby expunged from the journals of the senate and house of representatives of the eighth session of the legislature of Nebraska." Neb. Laws of 1877, 257. It is significant that when a new constitution was adopted in that state, a few years after this impeachment, it was provided that impeachments should be tried before the Supreme Court. Const. Neb. (1875) art. 3, § 14.

Closely related to the foregoing characteristic of legislative justice is a fourth, namely, the preponderance of purely partisan or political motives as grounds of decision. This is a conspicuous feature of legislative determination and adjustment of claims against the state.[101] It is conspicuous also in legislative impeachments.[102] It was notorious in the appellate jurisdiction of the House of Lords, until the settled practice that only law lords should vote turned the judicial side of that body into an ordinary court of justice.[103] It furnished one of the chief reasons for the abolition of the appellate jurisdiction of the senate in New York in 1846.[104]

Finally legislative justice has been disfigured very generally by

[101]Mark Twain has given us a characteristic sketch of the manner in which Congress dealt with claims against the government prior to the Court of Claims. The Facts in the Case of George Fisher, Deceased, Works (Hillcrest ed.) XIX, 132.

[102]The classical example is the impeachment of Andrew Johnson. See particularly the curious and inconsistent rulings of the senate upon admissibility of evidence, in the course of which the opinions of the Chief Justice of the Supreme Court were overruled. Trial of Andrew Johnson (official ed.) I, 674, 693, 696-697, 698-700, 701; also the opinions, particularly those of Senator Yates, *Ibid.* III, 102, 115, Senator Morrill of Maine, *Ibid.* 145-146, Senator Wilson, *Ibid.* 217-218, Senator Sumner, *Ibid.* 247-248, 256-260, 274-281. Some instructive comments upon the political character of these rulings and upon the opinions of the senators may be found in Blaine, Twenty Years in Congress, II, 369-370, 381. *Cf.* also Littlefield, The Impeachment of Judge Swayne, 17 Green Bag, 193. In the Constitution of New York adopted in 1846, the judges of the Court of Appeals were joined with the senators as members of the court for the trial of impeachments. The reason for this, as stated in the debates in the convention, was that the members of the senate "like those of all legislative bodies were more or less imbued with partisan feelings" and experience had shown "that an impeachment in an excited state of political feeling might grow out of that very feeling;" hence the "propriety of infusing into the court a share of the judicial force to restrain that feeling." Debates and Proceedings of the Convention for the Revision of the Constitution of the State of New York, 1846, 557. As to the last English impeachments, see the comments of Sir James Stephen, History of the Criminal Law, I, 160, and of Mr. Lovat Fraser, The Impeachment of Lord Melville, 24 Juridical Rev. 235. The former says: "The impeachment of Warren Hastings is, I think, a blot on the judicial history of the country."

[103]Encyclopaedia Britannica (11th ed.) II, 214. This was conspicuous in the attempt of lay lords to vote upon the reversal of the outlawry in Queen *v.* O'Connell. See Atlay, Victorian Chancellors, I, 144-145; Campbell, Lives of the Lord Chancellors, VIII, 144-146. It should be noted that the firmness of Lord Lyndhurst, a judge whose view of the law the lay peers sought to sustain, prevented a grave scandal to the administration of justice. Politically, he was in agreement with those whom he dissuaded from voting.

[104]"The Court for the Correction of Errors was distrusted as a fluctuating and partisan body, too numerous and unwieldy, containing many who had no knowledge of law and yet were not apt to yield to the opinions of the lawyers." Browne, The New York Court of Appeals, 2 Green Bag, 277, 278.

the practice of participation in argument and decision by many who had not heard all the evidence and participation in the decision by many who had not heard all the arguments. This was notorious when lay peers passed upon causes in the House of Lords,[105] and is often conspicuous in analagous cases of impeachments and legislative investigations.[106] Such a practice is wholly unknown in judicial justice, nor would the public tolerate it in judicial tribunals.

Are there any advantages in the administration of justice by legislative bodies to be set over against the foregoing defects? The one advantage claimed for it is that it is more responsive to the popular will. Similarly, in recent agitation for direct popular justice in certain cases, the advantage is claimed that justice will be made more immediately and completely expressive of the popular will.[107] The confusion of will and impulse involved in this claim has been remarked repeatedly.[108] But another consideration is of more weight. It must be borne in mind that the psychology of such tribunals is to a great extent the psychology of a crowd or mob. In a court, long habit, training, tradition and the critical scrutiny of a learned profession keep down the tendency to throw off individual responsibility, to abdicate individual reason and to yield to suggestion and impulse. In a large body not so trained and without judicial habits, we should expect, and experience shows that we must expect, many of the characteristic phenomena of what psychologists call the mob mind.[109] Moreover, administration of

[105]See note 102, *supra.* In the debates upon the judiciary in the New York Constitutional Convention of 1846, as a reason for a court of appeals composed of judges only, it was said that the court must be composed of "men who heard all the arguments and were present during the whole trial; they would not read, write, whisper or walk about when the trial was going on." Debates and Proceedings, 755.

[106]In the impeachment of Edmonds (Michigan, 1872) no less than twenty-one senators who voted upon the charges were absent during considerable portions of the time when testimony was taking. In the impeachment of Cox (Minnesota, 1881) thirty-three senators who voted upon all of the charges were absent from four to thirty-six days of a total of fifty-five. Two were absent ten days, one eleven days, one twelve days, two fourteen days, two fifteen days, two sixteen days, one seventeen days, two twenty days, two twenty-one days, one twenty-two days, one twenty-four days, one twenty-six days, one twenty-seven days, one twenty-nine days, one thirty-four days, and one thirty-six days. In the impeachment of Judge Prescott, a very suggestive colloquy took place between Daniel Webster, of counsel for the respondent, and the President of the Senate with reference to the disposition of the tribunal to arrive at a decision without having heard argument. Trial of Prescott, 207-209.

[107]See note 78, *supra.*

[108]This matter is well treated in Sidgwick, Elements of Politics, 360.

[109]"The big assembly skirts ever the slippery incline that leads down to mob madness." Ross, Social Psychology, 57. See Le Bon, The Crowd, chap. 5; Sidis, Psychology of Suggestion, 299.

justice by large bodies of this sort, along with or in the intervals of political business, is necessarily cumbersome and expensive.[110] In sum, legislative justice is uncertain, crude at its best and capricious at its worst, cumbersome and expensive, with no corresponding advantages. Hence from the Twelve Tables[111] to modern constitutions[112] men have agreed in prohibiting it. The provisions of modern constitutions in this respect represent more than the influence of eighteenth-century theory. They represent a universal experience of the ills involved in legislative justice.

IV. Executive Justice.[113]

In the nineteenth century the United States developed a system of judicial interference with administration. Law paralyzing administration was an everyday spectacle. Almost every important measure of police or administration encountered an injunction. We relied on taxpayers' suits to prevent waste of public funds and misuse of the proceeds of taxation. In some jurisdictions it was not uncommon to see collection of taxes restrained by injunction. In case of disturbance of the peace, the individual, and even in one signal instance the nation, had come to appeal for the protection of property and business, not to the police or to the administrative authorities, but to courts of equity. In a number of states the courts would direct writs of mandamus to the governor, where ministerial action was involved,[114] and in one state, in a heated election contest, the Supreme Court by mandamus ordered the speaker of the house of representatives to carry out constitutional provisions as to canvass of returns.[115] What in other lands was

[110]This was especially true of the legislative appellate jurisdiction in New York before 1846. Debates and Proceedings of the Convention for the Revision of the Constitution of the State of New York, 1846, 568.

[111]Tab. IX, l. 1 (Bruns, Fontes Iuris Romani Antiqui (6th ed.) I, 34).

[112]Clark, Australian Constitutional Law, 28 *et seq.;* Const. Brazil, arts. 15, 79 (Dodd, Modern Constitutions, I, 153, 176); Chili, art. 99 (Dodd, I, 253); Denmark, art. 2 (Dodd, I, 267); Mexico, art. 50 (Dodd, II, 44).

[113]Pound, Executive Justice, 55 Am. Law Reg. 137; Sidgwick, Elements of Politics, chap. 19, § 6; Bluntschli, Theory of the State (3rd Oxford ed.) 521-524; Friedman, A Word about Commissions, 25 Havard Law Rev. 704; Goodnow, The Growth of Executive Discretion, Proc. Am. Pol. Sci. Ass'n., II, 29; Parker, State and Official Liability, 19 Harvard Law Rev. 335; Harriman, Administrative Control of Corporations, Proc. Am. Pol. Sci. Ass'n., VI, 33; Parker, Administrative Courts for the United States, and discussion by Ernst Freund and F. J Goodnow, *Id.* 46, 58, 62; Powell, Judicial Review of Administrative Action in Immigration Proceedings, 22 Harvard Law Rev. 360; Ambrose, The New Judiciary, 26 Law Quart. Rev. 203.

[114]The cases are collected in a note in 10 Michigan Law Rev. 480.

[115]State *v.* Elder (1891) 31 Neb. 169.

committed to administration and inspection and supervision in advance of action we left to the courts, preferring to show the individual his duty by a general law, to leave him free to act according to his judgment, and to prosecute him and impose the predetermined penalty in case his free action infringed the law. It was deemed fundamental in our polity to confine administration to the inevitable minimum. In other words, where some peoples went to one extreme and were bureau-ridden, we went to the opposite extreme and were law-ridden.

A reaction from the extreme limitations of administration in our traditional polity, accelerated by the demands of an expanding law of public utilities and the requirements of modern social legislation, resulted in a rapid development of administrative bodies of all kinds and an incidental recurrence to executive justice. Contemporary legislation shows clearly enough that this recrudescence of executive justice is gaining strength continually and is yet far from its end. There is a strong tendency to take away judicial review of administrative action wherever it is constitutionally possible to do so, and where it is not possible, to cut down such review to the unavoidable minimum. This is manifest especially in recent legislation for the regulation of public utilities. An avowed object of most of the recent acts upon this subject is "to do away with the great delays, enormous expense, and great uncertainty of litigation,"[116] and this end is sought to be attained by setting up administrative tribunals and making their decisions final so far as possible. Where review is allowed, it is coming to be narrowly limited. Provisions that the legal rules of evidence shall not apply to these tribunals and that their proceedings shall not be examined for infringement of such rules are becoming common.[117] In Cali-

[116]Downey, Regulation of Urban Utilities in Iowa, 81. Prior to the recent public utility acts, an observer wrote: "The gradual growth of the doctrine of judicial review and the gradual development of the methods employed by the courts, have gradually paralyzed the state railroad commissions by destroying their will as well as their power. Under the burden of judicial review, the commissions have become discouraged from the task of rate regulation; most of them pay relatively slight attention to the matter of rates, confining themselves largely to the other and much less important duties imposed upon them. Some have practically desisted from rate-making. Some esteem their duty done when they attempt to arbitrate the few cases between carrier and shipper which are brought to their attention, but which form only a microscopical part of the great question of rates. This relaxation of effort, this growing indifference to the most important of all their functions, has been conspicuous in recent years, and is a discouraging feature of the railroad problem of today." Smalley, Railroad Rate Control, 124.

[117]In the model Public Utility Law, proposed by the department on Regulation of Utilities of the National Civic Federation, the provision on this

fornia[118] and Vermont[119] the findings of fact made by public utility commissions are pronounced conclusive. In five states, the courts, in reviewing the administrative proceedings, are restricted to the case certified to them by the commission.[120] But the reaction has gone much beyond restriction of judicial power in the regulation of public service companies. From fifteen to twenty statutes giving wide powers of dealing with the liberty or property of citizens to administrative boards, to be exercised summarily or upon such hearing as comports with lay notions of fair play, may be found enumerated in the reviews of current legislation in each of the last fifteen reports of the American Bar Association.[121] In the western states, within a decade, the venue of litigation over private water rights has been shifted from the courts to state boards of engineers or administrative boards of control. In Wisconsin, the State Industrial Commission is made an "administrative court of appeal."[122] Workmen's compensation legislation is threatening to take a great mass of tort litigation out of the domain of law and confide it to administration. Even in criminal causes, which we think of as *par excellence* the domain of the common law, juvenile courts, probation commissions and other attempts to individualize the treatment of offenders, and the endeavors of the medical profession to take questions of expert opinion out of the forum and commit them to a sort of medical referee,[123] bid fair to introduce an administrative element into punitive justice which is wholly alien to our inherited ideas.

Nor is the legislature alone in bringing back this extra-legal element to our public law. A brief review of the course of decision for the past fifty years will show that the judiciary has fallen into

point reads: "In the conduct of all hearings and investigations the commission shall not be bound by the technical rules of evidence. No informality of any proceeding or in the manner of taking testimony before the commission or any commissioner or any agent of the commission shall invalidate any order, decision, rule or regulation made, approved or confirmed by the commission."

[118]California Public Utilities Act, 1912, § 67.

[119]Vermont, Laws of 1908, no. 116, § 12.

[120]California Public Utilities Act, 1912, § 67; New Jersey, Public Utilities Act, 1911, § 38; Oklahoma, Const. art. IX, § 22; Vermont, Laws of 1908, no. 116, § 12; Washington Public Service Commission Act, 1911, § 86.

[121]The report for 1904 enumerates nineteen. The report for 1905 shows at least eighteen. In 1907 there are at least twenty-three.

[122]Wisconsin, Laws of 1911, chap. 485, § 1021, b-18, ¶ 2-3. See Commons, The Wisconsin Industrial Commission, The Survey, Jan. 4, 1913, p. 440.

[123]See Oppenheimer, The Criminal Responsibility of Lunatics, chap. 17. *Cf.* Jelliffe, The New York State Bar Association Questionnaire—Some Comments, Journ. Am. Inst. Crim. Law and Criminol. IV, 368.

line and that powers which fifty years ago would have been held purely judicial and jealously guarded from executive exercise are now decided to be administrative only and are cheerfully conceded to boards and commissions.

As yet judicial acquiescence in the revival of executive justice is a tendency only. The courts are not agreed. Some courts hesitate, while some are willing to give up everything but formal actions at law and suits in equity.[124] The tendency, however, is well marked. In general, the cases prior to 1880 tend to hold all matters involving a hearing and determination, whereby the liberty, property or fortune of the citizen may be affected, to be judicial. Since 1880, the cases, at first requiring an appeal or a possibility of judicial review, but later beginning to cast off even that remnant of judicial control, tend more and more to hold every sort of power that does not involve directly an adjudication of a controversy between citizen and citizen,—and in the case of disputes over water-rights and election contests some which do—to be administrative in character and a legitimate matter for executive boards and commissions.

Irrigation statutes afford an excellent example. Disputes over water-rights, where the conflicting claims of numerous appropriators, who had often "appropriated" many times over the maximum flow of the stream, threatened to give rise to multiplicity of suits, were first taken in hand by equity. The suit to "adjudicate a stream" became a familiar proceeding.[125] Later the matter was taken in hand by legislatures, and statutes were enacted whereby the power to determine the nature, priority and effect of the several appropriations and to apportion the stream was given to a state engineer or a state board of irrigation or a state board of control.[126] In 1870, a statute of this character was held unconstitutional on the ground that the power conferred was judicial.[127] Today, the courts are agreed that the power is not judicial and such statutes

[124]State *v.* Thorne (1901) 112 Wis. 81.

[125]Woodruff *v.* North Bloomfield Gravel Mining Co. (1883) 8 Sawy. 628; Frey *v.* Lowden (1886) 70 Cal. 550; Crawford *v.* Hathaway (1903) 67 Neb. 325, 370.

[126]"The legislature, finding the ordinary processes of law and the actions then known to the courts too expensive and also inadequate to meet the novel conditions incident to the appropriation of water for the purposes of irrigation, enacted a statute which * * * furnishes an elaborate system of procedure for the settlement of all questions of priority of appropriation of water." Long, Irrigation, § 99.

[127]Thorp *v.* Woolman (1870) 1 Mont. 168.

are upheld.[128] Again the older decisions were reluctant to concede to executive boards any power of hearing and determining charges against public officers and of removing them after such hearing.[129] At least one comparatively recent authority shows the same tendency.[130] But the later cases have settled that this power of removal after investigation may be given to executive officers or boards.[131] Power to determine who had the right to vote,[132] or to try election contests,[133] was formerly held to be judicial. Today it is settled that executive officers, without any appeal to the courts, may determine conclusively who are and who are not citizens.[134] Election contests may now be determined by administrative boards.[135] It has been decided that a Secretary of State may hear and determine a county-seat election contest,[136] that executive officers may be empowered to pass conclusively upon disputes as to nominations for public office,[137] and that a canvassing board may be empowered to determine the cause of withholding of returns not received and if they think it due to an intent to defeat the will of the electors, proceed to canvass those received.[138] As late as 1883, a statute giving a board of county commissioners power to hear and determine complaints against holders of licenses and to revoke licenses accordingly, was held bad as giving judicial power to executive functionaries.[139] Such power is now regarded as administrative only.[140] Recent decisions establish that power con-

[128]Farm I. Co. *v.* Carpenter (1900) 9 Wyo. 110; Crawford *v.* Hathaway (1903) 67 Neb. 325; Boise I. & L. Co. *v.* Stewart (1904) 10 Ida. 38. "They are in the nature of police regulations to secure the orderly distribution of water for irrigation purposes." Farmers' High Line Canal & Reservoir Co. *v.* Southworth (1889) 13 Colo. 111.

[129]State *v.* Towne (1869) 21 La. Ann. 490; Police Com'rs *v.* Pritchard (1873) 36 N. J. L. 101.

[130]Arkle *v.* Board of Com'rs (1895) 41 W. Va. 471.

[131]Donahue *v.* Will County (1881) 100 Ill. 94; State *v.* Oleson (1883) 15 Neb. 247; State *v.* Hawkins (1886) 44 Oh. St. 98; Fuller *v.* Ellis (1893) 98 Mich. 96; Cameron *v.* Parker (1894) 2 Okla. 277; Gilbert *v.* Board of Police Com'rs (1895) 11 Utah 378; State *v.* Common Council (1895) 90 Wis. 612; Gibbs *v.* Louisville (1896) 99 Ky. 490.

[132]Burkett *v.* McCarty (Ky. 1874) 10 Bush, 758.

[133]Stone *v.* Elkins (1864) 24 Cal. 125.

[134]U. S. *v.* Ju Toy (1905) 198 U. S. 253; U. S. *v.* Sing Tuck (1904) 194 U. S. 161; Lem Moon Sing *v.* U. S. (1895) 158 U. S. 538.

[135]Andrews *v.* Judge of Probate (1889) 74 Mich. 278.

[136]Bowen *v.* Clifton (1898) 105 Ga. 459.

[137]Allen *v.* Burrow (1904) 69 Kan. 812.

[138]Feek *v.* Township Board (1890) 82 Mich. 393.

[139]State *v.* Brown (1883) 19 Fla. 563.

[140]Hartford F. I. Co. *v.* Raymond (1888) 70 Mich. 485.

ferred upon a state board of land commissioners to cancel leases of state lands for fraud in procuring them is not judicial,[141] that the decision of an executive officer refusing to issue a patent to state lands is not judicial,[142] and that examiners who pass on one's right to practise a profession for which he has trained himself do not act judicially.[143] How far the exercise of wide powers of determining title to land under land-registration statutes is judicial, courts are not agreed.[144] How far the power to transfer inmates of a reformatory to a penitentiary, for mistake as to age, incorrigibility, or like cause, is judicial, has been a matter of dispute,[145] but very wide administrative powers with respect to parole and probation are coming to be upheld.[146] Nor are the courts insisting, as formerly, upon provision for judicial review. Statutes permitting the imposition of a penalty by an executive officer without any judicial trial and making the decision of a commissioner of navigation final on all questions of collection of tonnage tax and of refunding tonnage tax erroneously or illegally collected have been upheld.[147] An administrative officer may be authorized to determine finally and conclusively not only whether an alien has or has not sufficient property to enter the United States,[148] but even whether a person, who claims to be a citizen and as such to have the right to enter the United States, is or is not a citizen.[149] The review of assessments and equalization may be left finally to a purely administrative board.[150] A statute may confer wide and summary powers of dealing with property on a board of health without providing for any appeal.[151]

[141]American Sulphur & Min. Co. *v.* Brennan (1905) 20 Colo. App. 439.

[142]State *v.* Timme (1884) 60 Wis. 344.

[143]*Ex parte* Whitley (1904) 144 Cal. 167; *In re* Inman (1902) 8 Ida. 398; State *v.* Hathaway (1892) 115 Mo. 36.

[144]Tyler *v.* Judges of Registration (1900) 175 Mass. 71; People *v.* Simon (1898) 176 Ill. 165; State *v.* Guilbert (1897) 56 Oh. St. 575.

[145]Such a power was held judicial and statutes conferring it upon executive functionaries were held bad in People *v.* Mallary (1902) 195 Ill. 582; *In re* Dumford (1898) 7 Kan. App. 89. *Contra, In re* Linden (1902) 112 Wis. 523.

[146]People *v.* Joyce (1910) 246 Ill. 124; Berry *v.* Comm. (1911) 141 Ky. 422; State *v.* Ferguson (1910) 149 Ia. 476; Wallace *v.* State (1912) 91 Neb. 158; Ughbanks *v.* Armstrong (1908) 208 U. S. 481.

[147]Oceanic Steam Navigation Co. *v.* Stranahan (1909) 214 U. S. 320; North German Lloyd S. S. Co. *v.* Hedden (1890) 43 Fed. 17.

[148]Lem Moon Sing *v.* United States (1895) 158 U. S. 538.

[149]United States *v.* Ju Toy (1905) 198 U. S. 253.

[150]State *v.* Thorne (1901) 112 Wis. 81.

[151]Brown *v.* Narragansett (1899) 21 R. I. 503.

It is instructive to set over against the foregoing decisions the claim made by Coke for the Court of King's Bench:

"This court hath not only jurisdiction to correct errors in judiciall proceedings, but other errors and misdemeanors extrajudiciall tending to the breach of the peace or oppression of the subjects, or raising of faction, controversy, debate, or any other manner of misgovernment; so that no wrong or injury, either publick or private, can be done, but that this shall be reformed or punished in one court or other by due course of law."[152]

The new point of view is well expressed in these words:

"The administration of justice, properly so called, involves two parties, the party plaintiff and the party defendant, a wrong complained of by the former as done by the latter, and a remedy by way of redress or punishment applied to such wrong. Judicial proceedings which do not possess these characteristics, however closely in point of form they may approach to those which do, are essentially different from the administration of justice."[153]

To what are we to attribute this radical change of front? How are we to explain the tendency, judicial as well as legislative, to rely upon boards and commissions, to forego judicial control over arbitrary executive action, and to give free rein to summary administrative powers? Partly, the increasing complexity of life and minute division of labor require it. Yet this complexity and this division of labor developed for generations in which the common-law jealousy of administration was dominant. To no small extent, we must see in this recrudescence of executive justice one of those reversions to justice without law which are perennial in legal history and serve, whenever a legal system fails for the time being to fulfil its purpose, to infuse into it enough of current morality to preserve its life.

An instructive parallel may be found in the history of our legal system. In the middle of the sixteenth century, lawyers began to complain that the common law was being set aside and that scarcely any business of importance came to the king's courts of law. In the reign of Queen Mary, an observer wrote that the common-law judges had little to do but to look about them.[154] At this time, Maitland tells us, "in criminal causes that were of any political importance an examination by two or three doctors of the civil law threatened to become a normal part of our procedure."[155] For

[152] 4 Inst. 71.

[153] Salmond, First Principles of Jurisprudence, 75.

[154] Maitland, English Law and the Renaissance, 82, n. 52.

[155] *Id.* 22.

three hundred years the growing point of law had been in the king's courts of common law. As far back as the reign of Edward III, they had enforced the doctrine of the supremacy of law upon the collectors of the king's taxes[156] and had made clear to the king that he could not interfere by private letter with the due course of justice,[157] and more recently they had laid down that even parliament could not make the king a parson.[158] In Tudor England this growth stopped for a season. For a time the growing point of law was in quite another type of tribunal than the courts of common law. That was the age of the King's Council, of the Star Chamber, of the Court of Requests, of courts of a Roman, and, what was more important, a summary procedure. The movement away from the common law was a movement from judicial justice administered in courts to executive justice administered in administrative tribunals or by administrative officers. In other words, it was a reaction from justice according to law to justice without law, and in this respect again the present movement away from the common-law courts is parallel.

Equity, both at Rome and in England, began as executive justice. The *praetor,* interposing by virtue of his *imperium,*[159] the emperor enforcing *fidei-commissa* because, as the Institutes say, he was "moved several times by favor of particular persons,"[160] the Frankish king deciding, not according to law, but *secundum aequitatem* for those whom he had taken under his special protection,[161] and the Chancellor granting relief "of almes and charitie,"[162] acted without rule in accordance with general notions of fair play and sympathy for a wronged or weaker party. The executive justice of today is essentially of the same nature. It is an attempt to adjust the relations of individuals with each other and with the state summarily, largely according to the notions of an executive officer for the time being as to what the general interest and a square deal demand, unencumbered by many rules. The fact that it is largely justice without law is what commends it now to a busy and strenuous age, as it was what commended it to the individualism of an England set to thinking freely and vigor-

[156]Y. B. Mich. 12 E. 3, no. 23 (1338).

[157]Reginald de Nerford's Case, Y. B. Hil. 14 E. 3, no. 54 (1339-40).

[158]Prior of Castleacre's Case, Y. B. 21 H. 7, 1 (1506).

[159]Cicero, In Verrem, I, 45, 46.

[160]Inst. II, 23, 1.

[161]Goodwin, The Equity of the King's Court before the Reign of Edward I, 12.

[162]Dodd *v.* Browning, Calendars of Proceedings in Chancery, I, 13.

ously by Renaissance and Reformation. Moreover, the causes of each movement away from the common law courts and hence from the law are much the same. In each of the partial reversions to justice without law referred to, it happened that for the time being the law was not fulfilling its end. It was not adjusting the relations of individuals with each other so as to accord with the moral sense of the community. Hence *praetor* or emperor or king or chancellor administered justice for a season without law till a new and more liberal system of rules developed. In part a similar situation may be remarked today. The world over a shifting of ideas as to the end of the law and the meaning of justice is putting a heavy pressure upon the administration of justice according to law. This is inevitable, and only the gradual working out and fixing of the new conception can relieve the pressure. But another cause admits of more immediate relief. The machinery of justice may be more important for practical purposes than the rules to which that machinery gives effect. Often when the layman objects to the law it is because he judges the legal principle, not abstractly, as the lawyer does, but by what he takes to be its concrete workings; and these are often not the necessary workings of the rule itself, but only the chance working of a machinery inadequate to its task of making the rule effective. For example, Professor Wyman has made it clear that the principles of the common law were entirely adequate to deal with the problems of regulating public utilities. What failed was the enforcing agency.[163] Our prolific modern legislation has contributed nothing on the substantive side. Whatever it has accomplished of permanent value is in the way of providing better machinery.

Accordingly we may compare profitably the courts developed in and for feudal England, struggling to meet the wants of England of the Reformation by a feudal property law, with American courts, developed in and for the pioneer or agricultural communities of the first half of the nineteenth century, struggling to meet the wants of today with the rules and the machinery devised for such communities. Today the pressure of industrial accidents, a problem unknown to the formative period of our present law, the pressure of social legislation, which requires more speedy and assured enforcement than the legislation of the past, the new demands upon administration made by crowded urban communities, the great increase of litigation involved in the expansion of commerce and industry, as well as by the rapid growth of population,

[163]Public Service Companies, I, § 42.

and the new demands upon law, involved in a period of secularization in which we call upon law to do what was done formerly by church and home—all these strain to the utmost not merely the substantive law, but, even more, the machinery of application and enforcement.

We may, then, attribute the present popularity of executive justice partly to defects in our legal system, to an inadequacy of our legal tradition to the demands of a new idea of justice. But there is here little that is peculiar to American law. The problem of adjusting the law, shaped by the individualism of the past three centuries, to the ideal of social justice of the twentieth century is world-wide. Elsewhere this cause operates alone. In the United States it is aggravated by others. For the recrudescence of executive justice must be attributed chiefly to two other causes: (1) to a bad adjustment between law and administration, and (2) to the archaic organization of our courts, to cumbrous, ineffective and unbusinesslike procedure, and to the waste of time and money in the mere etiquette of justice, which, for historical reasons, disfigure American practice.[164] Recognizing this, we may take hope from legal history. For, although Coke lost in his quarrel with the Court of Chancery, the other Romanized courts perished, and Chancery was made over gradually along common-law lines. The equity made in the Court of Chancery and the law as to misdemeanors made in the Star Chamber became parts of our legal system; it is not too much to say they became parts of the common law. The common law survived and the sole permanent result of the reversion to justice without law was a liberalizing and modernizing of the law.

Thus the experience of the past indicates that if we improve the output of judicial justice till the adjustment of human relations by our courts is brought into better accord with the moral sense of the public at large and is achieved without unreasonable, not to say prohibitive delay and expense, the onward march of executive justice will soon cease. But we must be vigilant. Legislatures are pouring out an ever-increasing volume of laws. The old judicial

[164] In England prior to the Judicature Acts like causes were producing a like condition. Spencer, Essays, Moral, Political and Aesthetic (Am. ed.) 97-99. The revival of executive justice in England was undoubtedly retarded by the improved machinery of judicial administration introduced by the Judicature Act. But new social and economic conditions are bringing about "a tendency in recent years to remove from the courts matters which properly belong to them, and entrust them to Government Departments." Speech of the Master of the Rolls at the Mansion House, 1911, 56 Solicitors Jl. 77.

machinery has been found inadequate to enforce them. They touch the most vital interests of the community, and it demands enforcement. Hence the executive is turned to. Summary administrative action becomes the fashion. An elective judiciary, sensitive to the public will, yields up its prerogatives, and the return to a government of men is achieved. If we are to be spared a season of oriental justice, if we are to preserve the common-law doctrine of supremacy of law, the profession and the courts must take up vigorously and fearlessly the problem of today—how to *administer* the law to meet the demands of the world that is. "Covenants without the sword," says Hobbes, "are but words."[165] If the courts cannot wield the sword of justice effectively, some other agency must take it up.

But there is more to do than to improve the machinery of judicial administration of justice. A better adjustment between law and administration is needed. For historical reasons, administration has been the weak point of our common-law polity. England had a strong central government at an earlier date than the rest of the modern world. England had also strong courts of general jurisdiction before her neighbors. Hence before there was much call for administration of a modern type, need had been felt of putting checks upon the English crown in the interest of the individual and of the local community; and strong courts were at hand to impose them. The tendency thus acquired by our law was intensified during the seventeenth-century contests between courts and crown and was still further intensified by the conditions of the formative period of American law. A pioneer or a sparsely settled rural community is content with and prefers the necessary minimum of government. The social interests in general security, in security of acquisitions and in security of transactions require a certain amount of governmental machinery. They require civil and criminal tribunals and standards of decision to be applied therein. But when every farm was for the most part sufficient unto itself, the chief concern was lest the governmental agencies set up to secure these social interests might interfere unduly with individual interests. This pioneer jealousy of governmental action was reinforced from another quarter. Puritan influence had much to do with shaping originally the materials upon which we worked in making American law and American legal institutions. It had more to do with the way in which we worked them into an Ameri-

[165]English Works (Molesworth's ed.) III, 154.

can common law.[166] The age of Coke, the classical period of our Anglo-American common law, was the age of the Puritan in England. Indeed the parliament of the Commonwealth printed Coke's Second Institute, some parts of which are almost a text book of our American bills of rights. And the period that ends with the Civil War, the formative period of American law, was the age of the Puritan in America.

The Puritan conceived of law as a guide to the individual conscience. The fundamental proposition from which he proceeded was that man was a free moral agent with power to choose what he would do and a responsibility co-incident with that power. Hence he put individual conscience and individual judgment in the first place. He believed that no authority should coerce them, but that everyone must assume and abide the consequences of the choice he was free to make. His principle of consociation rather than subordination[167] demanded that a fixed, absolute, universal rule, which the individual had contracted to abide, be resorted to; not the will nor discretion of the magistrate. It demanded that the state and the law interfere after action, but not before; it demanded judicial imposition of penalties upon one who had wilfully chosen the wrong course, not administrative compulsion to take the right course. Hence our polity developed an inconsistency that is part of the Puritan character. He rebelled against control of his will by state or magistrate, yet he loved to lay down rules, since he believed in the intrinsic sinfulness of human nature. In the same way we have devoted our whole energies to legislation and judicial law-making. At the same time the enforcing agencies, both administrative and judicial, have not merely been neglected, they have been deliberately hampered, lest they interfere unduly with the individual free will.

We have tried, then, to extend law to matters not suitable for judicial justice, and thus have tied down administration too rigidly. But we have tried also to reduce the judicial administration of justice to chapter and verse of written rule on its purely administrative side, for example in the law of evidence and the details of procedure, where a wide margin of discretion is imperative. Accordingly, our judicial justice has not merely broken down in the attempt to do what was not judicial, but it has fallen far short of what it should be in purely judicial matters.

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[166] See my paper, Puritanism and the Common Law, 45 Am. Law Rev. 811.

[167] "We are not over one another," said Robinson, "but one with another." See Lord Acton, Lectures on Modern History, 200.

Granting that administration should be left to administrative officers, what are the advantages of executive justice in the determination of ordinary controversies and the application and enforcement of the rules of private law? Those which are claimed for it are those which are claimed for justice without law; directness, expedition, conformity to the popular will for the time being, freedom from the bonds of purely traditional rules, freedom from technical rules of evidence and power to act upon the everyday instincts of ordinary men. Obviously, therefore, its defects are those of justice without law, and need not be repeated. A few points, however, deserve especial emphasis. Directness and freedom from forms and from traditional rules have disadvantages as well as advantages. Forms serve a useful purpose in the administration of justice so far as they compel deliberation and by so doing guard against suggestion and impulse and "mob-mind" and insure the application of reason to the cause in hand.[168] Again, where laws are administered by laymen without conscious attempt to work out a system of reasoned interpretation and application, the results are quite as unsatisfactory, though in another way, as when they are administered with pedantic narrowness by lawyers. Thus in the administration of workmen's insurance in Germany, a serious defect has developed in the tendency of the administrative Insurance Court to "regard itself rather as a body charged with the admintration of a charity than as a judicial body charged with the construction and the administration of a legislative act."[169] This is even more true where decision of controverted questions of fact is involved. A rational method of determining such questions is no more to be attained by turning them over to the unfettered common sense of a lay magistrate than by the other extreme of imposing an unreasonable burden of technical rules upon the trained judge. Yet if we are to go to extremes, the advantage lies with judicial justice, however hampered, since, at least, its course may be predicted and the technical rules which obstruct its course may

[168]"Those who would conduct such proceedings as they would a committee meeting or a business conference quite overlook the peculiarities of the problem. * * * Radical as he is, Letourneau admits that 'even today in most civilized countries a rigid, almost hieratic formalism still accompanies the administration of justice, *and certainly influences the mind of both judges and judged.*'" Ross, Social Control, 113. See also Ross, Foundations of Sociology, 130.

[169]Bohlen, Workmen's Compensation (Address before the Law Association of Philadelphia, 1912) 34. See Friedensburg, The Practical Results of Workingmen's Insurance in Germany (Gray's transl.) 1911.

be mastered. In a modern state, executive justice, beyond what is involved in a proper balance between law and administration, is an evil, even if sometimes a necessary evil. It has always been, and in the long run it always will be crude and as variable as the personalities of officials. No one can long be suffered to wield the royal power of deciding without fixed principles according to convictions of right but one trained to subordinate impulse and will to reason, disciplined in the exercise of reason and experienced in the difficult art of deciding controversies. If we did not know it, legal history could teach us that no one may be trusted to dispense with rules but one who knows the rules thoroughly and knows how to apply them on occasion. Hence time has always imposed a legal yoke upon executive justice and has turned administrative tribunals into ordinary courts.[170] A law-ridden people, finding that, in a time which demands positive action, the legal system furnishes only checks and safeguards, may for a time throw over justice according to law and seek relief outside of the law. But so used justice without law can be no more than a temporary expedient in the world of today. Modern constitutions do more than reflect eighteenth-century political theory when they forbid executive justice and provide for judicial determination of the limits of executive action.[171] These provisions reflect experience of many

[170]This is becoming apparent today in the decisions of American public utility commissions. Perhaps the most notable instance is to be seen in the decisions of the Railway Commission of Wisconsin. The reports of these decisions have all the air of ordinary law reports. The commission bases its decisions largely upon its past decisions as precedents and obviously is building up a body of principles which will soon make of it simply an ordinary court. In New York also the decisions of public utility commissions are tending in the same direction.

See also Smithers, Executive Clemency in Pennsylvania. This book shows strikingly how executive discretion in a subject which should not be a matter of rule may develop rules through repeated decision of similar cases. The attempt to reduce the pardoning power to rules in this particular instance may be in part attributable to the mistaken tendency of the nineteenth-century lawyer to reduce everything to rule. Evidently, however, public dissatisfaction with arbitrary executive exercise of the power has also been a factor.

[171]Austria gives the Imperial Court (*Reichsgericht*) jurisdiction over conflicts between judicial and administrative authorities as to whether a matter is of judicial or administrative cognizance. Fundamental Law concerning the Establishment of an Imperial Court, art. 2 (Dodd, Modern Constitutions, I, 84). *Cf.* "Justice shall be separated from administration in every case." Fundamental Law concerning the Judicial Power, art. 14 (Dodd, I, 87). In addition to a provision for separation of powers in art. 15, the Constitution of Brazil provides (art. 79) that "a citizen vested with functions belonging to one of the three federal powers shall not exercise those belonging to the other two." (Dodd, I, 153, 176). The constitution of Chili (art. 99) provides for complete separation of the judicial function: "The power to try civil and criminal cases shall belong exclusively to the

peoples under most diverse conditions. It is no accident that France, which was the first country to develop modern administration, is more and more turning its administrative tribunals into ordinary courts.[172]

(To be Concluded.)

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courts established by law. Neither Congress nor the President of the Republic shall in any case exercise judicial functions, remove pending cases to a superior court or revive cases already decided." (Dodd, I, 253). The constitution of Denmark, after a general provision as to separation of powers (art. 2) provides expressly that "the judicial power shall be distinct from the executive power, in accordance with rules to be established by law." (Dodd, I, 267, 277). The constitution of Mexico along with a provision for separation of powers (art. 50) has a special provision (art. 21) against executive punitive justice (Dodd, II, 44, 51). As to the experience of Colonial America with executive justice, see Warren, History of the American Bar, 136; Noble *v.* Man, Pennypacker, Pennsylvania Colonial Cases, 27; Tanner, The Province of New Jersey (Columbia University Studies in History, Economics and Public Law, vol. 30) chap. 23, especially pp. 500 *et seq.;* Fisher, New Jersey as a Royal Province (Columbia University Studies in History, Economics and Public Law, vol. 41) chap. 8.

[172]Duguit, Les Transformations du droit public, chap. 5, § 7; Parker. State and Official Liability, 19 Harvard Law Rev. 335.